SUPREME COURT, U. S.

JUL 31 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 440

CHARLES N. BAPTIST,

Petitioner,

v.

BANKERS INDEMNITY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID S. MACLAY
FRANK F. OBER
MARSH, DAY & CALHOUN
955 Main Street
Bridgeport, Connecticut
Counsel for Petitioner

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statement of the Case 2

Reason for Granting the Writ—Argument 7

Conclusion 11

Appendix:

Opinion of the U. S. Court of Appeals for the Second Circuit 13

Table of Authorities Cited

Cases:

American Ins. Co. v. Saulnier, 242 F. Supp. 257 (D. Conn. 1965) 10

Baptist v. Shanen, 145 Conn. 605, 145 A. 2d 592 (1958) 3

Fogarty v. Fidelity & Casualty Co., 120 Conn. 296 180 Atl. 458 (1935) 8

Giokaris v. Kincaid, 331 S. W. 2d 633 (Mo. 1960) 10

PAGE

Hill v. Employers Liability Assurance Corporation, 122 Conn. 193, 188 Atl. 277 (1936) 8, 9, 10

O'Brien v. John Hancock Ins. Co., 143 Conn. 25, 119 A. 2d 329 (1955) 7, 8, 9, 10

Preferred Accident Ins. Co. of N. Y. v. Grasso, 186 F. 2d 987 (2 Cir. 1951) 7, 10

Statutes:

Conn. Gen. Stat. Sec. 38-175 (1958) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

CHARLES N. BAPTIST,

Petitioner,

v.

BANKERS INDEMNITY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Charles N. Baptist prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 19, 1967.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, is printed in the appendix hereto and also in the Proceedings in United States Court of Appeals, Second Circuit (Proceedings 30a). The opinion of the District Court for the District of Connecticut relating to the disposition of the reformation count is reported at 245 F. Supp. 33, and is reprinted at page 47a of Volume I of Appendix to Appellant's Brief which is a part of the certified record herein from the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered on April 19, 1967. Petitioner's timely petition for rehearing was denied on May 10, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented

Did the Court of Appeals and the District Court err in holding that under Connecticut law the insured has the burden of proving the non-applicability of an exception or exclusion contained in a liability insurance policy?

Statement of the Case

The Petitioner was seriously injured when an automobile operated by David Shanen collided in Connecticut with a car driven by Baptist, the Petitioner (Proceedings 34a). The automobile driven by Shanen bore dealer's registration plates registered in the name of a garage corporation (the "garage" was Harold & Shanen's Auto Service, Inc., a two man gasoline service station and used car business). (App. to Appellant's Brief, Vol. I, p. 88a). Shanen was the president and principal stockholder of the garage corporation (Proceedings 33a).

Baptist commenced a personal injury action in the Fairfield County Superior Court of Connecticut against Shanen and the garage (Proceedings 37a). The garage was the named insured under a so-called garage liability policy issued by the Bankers Indemnity Company, the Respondent herein. The insurance company entered an appearance

and defended on behalf of the garage corporation, but refused to do so for Shanen individually. A default judgment in the amount of $45,000.00 was entered against Shanen, but a directed verdict was granted in the action against the garage corporation on the grounds that Baptist had not succeeded in proving that Shanen was acting as an agent of the corporation; ownership of the automobile by the garage or Shanen was not in issue in the state court action (Proceedings 39a).

Baptist appealed, but the trial judge's rulings were affirmed in November, 1958. *Baptist* v. *Shanen*, 145 Conn. 605, 145 A. 2d 592. Thereupon, Baptist, a citizen of New Hampshire, commenced this diversity action in the District Court for the District of Connecticut to collect $25,000.00 of the $45,000.00 default judgment from Bankers Indemnity Company, a citizen of New Jersey, claiming Shanen's individual liability was included within the coverage of the policy with $25,000.00 limits which it had issued to the garage corporation (Appendix to Appellee's Brief 13a). The action was brought pursuant to Conn. Gen. Stat. Sec. 38-175 (1958) subrogating an unsatisfied tort claimant to all the rights of the insured. By the time of trial in 1964, the complaint had been amended to include a claim that the defendant was estopped to deny coverage because of the circumstances under which the policy had been issued, and also to include a second count in the alternative to reform the policy to specifically cover Shanen (App. to Appellant's Brief, Vol. I, pp. 3a-6a). The first count was tried to a jury, but all evidence of estoppel was excluded as "parol evidence." After deliberating for a substantial part of two days and returning once to seek clarification of the judge's charge, the jury brought in a defendant's verdict (App. to Appellant's Brief, Vol. I, p. 2a).

Under the pertinent parts of the insurance policy in question, all in the section labeled "Insuring Agreements" (the policy is reproduced in full in App. to Appellant's Brief, Vol. II, p. 224a), the Respondent agreed with the named insured (Harold & Shanen's Auto Service, Inc.) as follows:

"I COVERAGE A—BODILY INJURY LIABILITY

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . arising out of the hazards hereinafter defined.

"COVERAGE B . . .

• • • • •

"DEFINITION OF HAZARDS

"DIVISION 1—PREMISES—OPERATIONS—AUTOMOBILES

The ownership, maintenance or use of the premises for the purposes of an automobile dealer, repair shop, service station, storage garage or public parking place, and all operations necessary or incidental thereto; and the ownership, maintenance or use of any automobile in connection with the above defined operations, and the occasional use for other business purposes and the use for non-business purposes of any automobile owned by or in charge of the named insured and used principally in the above defined operations.

"DIVISION 2—PREMISES—OPERATIONS—AUTOMOBILES NOT OWNED OR HIRED

The ownership, maintenance or use of the premises for the purpose of an automobile repair shop, service station, storage garage or public parking place, and all

operations necessary or incidental thereto; and the use in connection with the above defined operations of any automobile not owned or hired by the named insured, a partner therein or a member of the household of any such person.

"DIVISION 3 . . .

* * * * * *

"II DEFENSE, SETTLEMENT . . .

* * * * * *

"III DEFINITION OF INSURED

With respect to the insurance under coverages A, B and D the unqualified word 'insured' includes the named insured and also includes (1) any partner, employee, director or stockholder thereof while acting within the scope of his duties as such, and any person or organization having a financial interest in the business of the named insured covered by this policy; and (2) any person while using an automobile covered by this policy, and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. This policy does not apply:

"(a) . . .

"(b) to any partner, employee, director, stockholder or additional insured with respect to any automobile owned by him, or by a member of his household other than the named insured;

"(c) . . ."

In other words, the policy covered "the insured's" liability ("Coverage A" under "Insuring Agreements") with

respect to a wide range of automobiles "used" or "maintained" or "owned" or "not owned" "in connection with" the garage business including the "non-business" use of such cars "owned by or in charge of the named insured" ("Definition of Hazards," Divisions 1 and 2). It then extended this coverage to a wide range of persons (all defined as "the insured" in addition to "the named insured") including any person "having a financial interest in the business" and "any person while using an automobile covered by this policy" ("III Definition of Insured").

Then, in a proviso tacked onto the very end of this section, it excluded the liability of an employee, stockholder, etc., "with respect to any automobile owned by him."

The narrow question submitted to the jury was whether Shanen "owned" the car within the meaning of this policy exclusion, it having been conceded by the defendant that there *was* coverage if he did *not* "own" it (Proceedings 29a).

Despite the Petitioner's contrary requests and subsequent exceptions (App. to Appellant's Brief, Vol. I, pp. 16a and 40a, respectively), the District Court charged the jury with respect to this narrow question that "The burden of proving by a preponderance of evidence that Shanen did not own the automobile—thereby making the policy applicable—rests upon plaintiff" (App. to Appellant's Brief, Vol. I, p. 29a).

Later in his charge, the trial judge again stressed that the burden of proving that Shanen "did not own the car involved here, and therefore, that said car was covered by the insurance policy involved in this case, rests upon plaintiff" (App. to Appellant's Brief, Vol. I, p. 32a).

And still later in his charge, in defining "burden of proof," the judge for a third time reminded the jury that the plaintiff, and only the plaintiff, had this burden (App. to Appellant's Brief, Vol. I, pp. 33a-34a).

This charge on the critical issue of burden of proof of ownership was upheld by the Court of Appeals which simply stated: "But this very point of Connecticut law was resolved in favor of the insurer by our decision in *Preferred Accident Ins. Co. of N. Y.* v. *Grasso*, 186 F. 2d 987 (2 Cir. 1951). We find no error here" (Proceedings 55a).

Reasons for Granting the Writ—Argument

Few matters of local law have greater impact upon a trial than the placing of the burden of proof on the central issue of the case. In this case the central issue (and, in fact, the only issue submitted to the jury) was whether or not Shanen "owned" the car within the meaning of a policy proviso in effect excluding such cars.

The interpretation and reliance placed by the Court of Appeals on *Preferred Accident Ins. Co. of N. Y.* v. *Grasso*, 186 F. 2d 987 (2 Cir. 1951) with respect to burden of proof, places the Court of Appeals in direct conflict with both older and more recent decisions of the Supreme Court of Connecticut on this "important matter"[1] of local law.

The Connecticut rule that should have been applied in a case such as this is set out in *O'Brien* v. *John Hancock Ins. Co.*, 143 Conn. 25, 119 A. 2d 329 (1955), where it is held that the person claiming under an insurance policy has the

[1] This question was so characterized by Judge Clark in *Preferred Accident Ins. Co. of N. Y.* v. *Grasso*, 186 F. 2d at 991.

burden of proving he comes generally under the coverage of the policy, but that the insurer has the burden of proving the applicability of an exception to the coverage. The *O'Brien* case involved a question whether death was accidental or caused by disease under the double indemnity provisions of a life insurance policy. The court held in part, 143 Conn. 28-29:

> "There are, however, more provisions in the paragraph setting up the double indemnity agreement than those defining the scope of the insured risk. At the end of that paragraph the insurer proceeded to add a number of exceptions. These were obviously inserted for the purpose of withdrawing from the coverage certain specific risks. . . .
>
> ". . . The burden of proving an exception to a risk is on the insurer. *Wojcik* v. *Metropolitan Life Ins. Co.*, 124 Conn. 532, 534, 1 A. 2d 131; *Hill* v. *Employers' Liability Assurance Corporation*, 122 Conn. 193, 202, 188 A. 277; *Fogarty* v. *Fidelity & Casualty Co.*, 120 Conn. 296, 299, 180 A. 458; 6 Cooley, Insurance (2d Ed.) p. 5003; 8 Couch, Insurance, §2217. . . ."

Or as was stated in *Hill* v. *Employers Liability Assur. Corp.*, 122 Conn. 193, 202, 188 Atl. 277 (1936):

> "When a policy insures generally against a particular risk but contains a clause exempting the insurer from liability for a loss caused or arising in a specified manner, but which otherwise would have fallen within the general terms of the policy, that clause is to be regarded as having been inserted by way of proviso, and not as constituting a condition precedent, and should be so pleaded . . . and treated as such."

In the present case, the respondent's policy covered the liability of the corporation (the named insured) with respect to a broad range of automobiles ("used", "owned", "not owned", "in connection with" the business, and "for nonbusiness purposes", etc.). It then extended this coverage to a wide range of persons all defined as "the insured" (including "any person having a financial interest in the business" and also "any person while using an automobile covered by this policy"). Here was a broad sweeping grant of coverage. Then, *further on* in the policy, to quote the *O'Brien* case, " . . . the insurer proceeded to add a number of exceptions. They were obviously inserted for the purpose of withdrawing from the coverage certain risks". The defendant's policy sought to withdraw the risk of covering a person (Shanen, the employee-stockholder) who was otherwise covered under the policy and with respect to a car which was otherwise covered.

This proviso, coming as it did after all the policy provisions relating to "Hazards" and coverage, was clearly an "exception" and not merely an explanation or clarification of earlier language. However, in any event, any doubt in this regard would have to be resolved against the defendant. As was said in the *O'Brien* case, 143 Conn. at p. 29 with respect to this very question of whether such a proviso was a "true exception":

> "This result necessarily follows from applying the rule that when a policy is so framed as to leave room for two constructions, the words used in it should be interpreted most strongly against the insurer. *Rinaldi* v. *Prudential Ins. Co.*, 118 Conn. 419, 423, 172 A. 777."

Nor is the rule of the *O'Brien* case restricted to life insurance policies. *Hill* v. *Employers Liability Assur. Corp.*,

supra, involved a liability policy on a building which excluded coverage during structural alterations. In *American Ins. Co.* v. *Saulnier*, 242 F. Supp. 257 (D. Conn. 1965), Judge Blumenfeld held that a negligence liability insurer had the burden of proving the applicability of a provision stating: "Sec. 2 of this policy does not apply . . . to injury . . . caused intentionally by the insured." See also, *Giokaris* v. *Kincaid*, 331 S. W. 2d 633 (Mo. 1960), which involved an exclusion from so-called "drive other cars" coverage of other cars owned by the insured's family.

As a matter of fact, *Preferred Accident Ins. Co. of N. Y.* v. *Grasso, supra* (and the Connecticut cases cited therein), relied upon by the Court of Appeals only considered the general burden of proving coverage under an insurance policy and not the specific burden of proving the applicability of a specific policy exclusion. This interpretation of *Preferred Accident* is implicit in *American Ins. Co.* v. *Saulnier, supra*, which follows *O'Brien* and places on the insurer the burden of proving the applicability of an exclusion while at the same time in a footnote citing *Preferred Accident* for its main holding that the burden of proof in a declaratory judgment action is not affected by the fact that the insurer may be the plaintiff.

Nevertheless, the Court of Appeals in the instant case has so applied the *Preferred Accident Ins. Co. of N. Y.* case to place it in direct conflict with the later *O'Brien* case and the earlier *Hill* case.

As a result, in this particular case the burden was placed on the Petitioner of proving a negative fact, namely, that he did not come within the exception to the policy coverage which excepts from coverage vehicles owned by

an employer-stockholder of the named insured. The Petitioner was thereby fatally penalized for putting on his evidence in reliance upon the law as set forth by the Supreme Court of Connecticut.

But if the Court of Appeals decision in this case is allowed to stand, the harmful results will reach far beyond this Petitioner. Suits involving insurance policies, particularly automobile liability policies, occur frequently in both state and federal courts, and unless this conflict between the Supreme Court of Connecticut and the United States Court of Appeals for the Second Circuit is definitively resolved, insureds, insurers and beneficiaries of policies will be in a quandry over how to proceed with their causes, and the insurers will presumably make every effort to remove their matters to the federal court to benefit by the Court of Appeals' favorable ruling on this all important question of proof.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID S. MACLAY
FRANK F. OBER
MARSH, DAY & CALHOUN
955 Main Street
Bridgeport, Connecticut
Counsel for Petitioner

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 116—September Term, 1966.

(Argued November 15, 1966 Decided April 19, 1967.)

Docket No. 30100

CHARLES N. BAPTIST,

Plaintiff-Appellant,

—v.—

BANKERS INDEMNITY COMPANY,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
MEDINA and KAUFMAN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the District of Connecticut, William H. Timbers, *Chief Judge.*

Charles N. Baptist appeals from a judgment in favor of Bankers Indemnity Company entered on a jury verdict denying recovery under a garage liability policy and denying reformation of the policy. Opinion below reported at 245 F. Supp. 33. Affirmed.

DAVID S. MACLAY, Bridgeport, Connecticut (Marsh, Day & Calhoun, Bridgeport, Connecticut, on the brief), *for plaintiff-appellant.*

PHILIP R. SHIFF, New Haven, Connecticut (Adrian W. Maher, Bridgeport, Connecticut, on the brief), *for defendant-appellee.*

MEDINA, *Circuit Judge*:

Charles N. Baptist appeals from a judgment entered in favor of Bankers Indemnity Company which he sued by way of subrogation to the rights of David Shanen, with whom Baptist was involved in an automobile accident. The damage claim was tried to the court and a jury and resulted in a verdict for defendant. There was also a count seeking reformation of the policy of insurance out of which Shanen's rights were said to have arisen. After the conclusion of the jury feature of the case the reformation count was tried to the court without a jury and this count was dismissed on the merits. The factual issue on the first trial was whether David Shanen was the owner of the car he was driving at the time of the accident. The jury found he was the owner and this led to judgment for Bankers Indemnity on the first count because cars owned by him and operated by him for his own business or pleasure were not covered by the policy. The opinion of Chief Judge Timbers, relating to the disposition of the reformation count, is reported at 245 F. Supp. 33.

Appellant's brief contains no narrative of the facts, chronological or otherwise. It is asserted that there are so many alleged errors "that it is impractical to take them up in any really logical order or even to cover all of them."

Our study of the transcript and the exhibits, however, has enabled us to understand the chronological sequence of events and place the various matters of controversy in some reasonable relation to one another. Further consideration in the light of our factual survey disclosed that almost all the contentions of appellant were without merit. A few warrant brief discussion and this discussion will follow immediately after our chronological statement.

I

Chronological Survey 1951-1962

Long prior to the time Baptist was injured Harold Lefflbine owned, maintained and operated a small gasoline filling station and automobile repair shop, known as Harold's Tydol Service Station, at 66 South Street in Stamford, Connecticut. Bankers Indemnity Company had issued its standard garage liability policy to Harold Lefflbine d/b/a Harold's Tydol Service Station, as the named insured, to be effective for a one-year period beginning February 26, 1952. This policy applied to all cars owned by or operated in the business and as agent of the named insured, but it plainly excluded coverage "to any partner, employee, director, stockholder or additional insured with respect to any automobile owned by him, or by a member of his household other than the named insured." In other words, if any partner, employee, director or stockholder owned a car and had an accident while operating that car in the business and as agent of the named insured the policy applied and Bankers Indemnity was required to defend an action brought aganst the named insured for damages arising out of the accident and to indemnify the named insured up to the amount provided in the policy or $25,000. But if such a person had an accident while driving his own car for his

own pleasure or on business not connected with the filling station and repair shop, this person was not covered by the policy.

David Shanen, with some years of experience in gas service station operation, garage repair and auto wrecking, agreed to team up with Lefflbine. On April 1, 1952 a new corporation was formed with the name Harold & Shanen's Auto Service, Inc. Of the 30 shares of common stock 28 were issued to David Shanen, who was to become President and to pay for the stock with $1000 in cash and property of the value of $1500. The property was agreed to be two cars owned by David Shanen, a 1949 Chevrolet sedan purchased by him on August 1, 1951 and a Ford tow truck. As the affairs of the new corporation were conducted on an informal basis, there never was any legal transfer or bill of sale passing title to these two cars to the corporation. David Shanen's 17 or 18 year old son Allen was to have 1 share and he was made Secretary and Treasurer. Lefflbine also was to have 1 share and he was made Vice-President. The business was to operate the filling station and repair shop, also to buy and sell used cars.

Also on April 1, 1952 Bankers Indemnity issued its endorsement to Lefflbine's policy, changing the name of the insured to "Harold Lefflbine and David Shanen d/b/a Harold & Shanen's Auto Service, Incorporated." Otherwise the policy coverage and all its terms remained as before.

As Conn. G. S. Secs. 14-165 *et seq.* was not enacted until 1957 and there were no statutory provisions for certificates of title or automobile title registration, Lefflbine and David Shanen, in the name of the corporation, applied for and obtained a number of dealer's plates and one of these was affixed to the 1949 Chevrolet.

On December 26, 1952 while David Shanen was driving the 1949 Chevrolet he had a collision with a car driven by Baptist and Baptist was injured.

On December 27, 1952 Baptist filed his report of the accident with the Connecticut Department of Motor Vehicles stating that he was the owner and operator of his car and that "Dave Shanen" was the owner and operator of the Chevrolet bearing used dealer's License No. OA-39.

We then come to a period during which David Shanen seems to have disappeared. He was then separated from his wife, "was not at home and could not be located." The 1949 Chevrolet was at the filling station. So, according to appellant's counsel, the son Allen, "to protect his family's interest" and "acting on his own behalf" proceeded to make a deal with Lefflbine by which he "bought" the 1949 Chevrolet from Lefflbine, received a promissory note for $1000 and turned over the stock to Lefflbine. There was nothing to connect this transaction with David Shanen, nor is it claimed that any corporate action was taken. The trial judge properly rejected this evidence. The wisdom of this course became apparent when the proof developed the fact that David Shanen promptly reappeared and "recovered" the 1949 Chevrolet from his wife. He later had a dispute with his wife over the car, but, as stated in appellant's brief, he prevailed "without going to court."

On January 14, 1953 David Shanen placed a chattel mortgage on the 1949 Chevrolet to secure a personal loan. In this transaction he, of course, represented he was the owner of the car. This was evidently done while his wife was still in possession of the car, as his statement of February 6, 1953 for Bankers Indemnity says his "former wife" still has it. In the same statement he says the car

is "owned by Harold & Shanen's Auto Service, Inc. It belongs to the corporation. I was using my car for the business. * * * I don't believe the ownership was transferred. I wouldn't think it would have to be transferred back. I used the car when I was in the business. She uses it now."

On April 2, 1953 David Shanen settled for $24.16 his claim for damage to the 1949 Chevrolet in the accident on December 26, 1952 with Motors Insurance Corporation representing the collision insurance carrier that had issued a policy in connection with the conditional sale contract with David Shanen at the time he bought the 1949 Chevrolet in 1951. While this settlement was made on April 2, 1953 it was obviously based on a claim that David Shanen owned the 1949 Chevrolet on December 26, 1952, the date of the accident as recited in the document, Exhibit 16.

On April 24, 1953 David Shanen signed what is probably the most important document in the case. It is his report of the accident to the Connecticut Department of Motor Vehicles. This report is typewritten and sworn to before Alphonse C. Jachimczyk, a Commissioner of the Superior Court. In this report David Shanen states that he was the owner of the 1949 Chevrolet involved in the collision of December 26, 1952 with Baptist. David Shanen testified he consulted with Jachimczyk when preparing the report and that, although Jachimczyk was a lawyer he consulted him as a friend.

As part of this accident report is a detachable sheet, described as S. R. 21, in which the person making the report is required to set forth data concerning any insurance carried by him. David Shanen included the name of the insurance company and the number of the policy. This S. R. 21 was sent by the Commissioner to the in-

surance company with a request that it be returned in 15 days "if no policy was in effect as alleged." There are 6 little boxes to be checked as follows:

> With regard to an automobile liability insurance policy for the policyholder named on the reverse side hereof, the undersigned insurance company advises you in accordance with the items checked below.
>
> 1. No policy was in effect on the date of accident.
> 2. Our policy for the named policyholder applies to him as the operator but it does not apply to the owner of the vehicle involved in the accident.
> 3. Our policy applies to the owner of the vehicle, but does not apply to the operator of the vehicle involved in the accident.
> 4. Our policy affords bodily injury coverage only.
> 5. Our policy affords property damage coverage only.
> 6. Our policy affords limits of liability less than $20,000/20,000 bodily injury and $1,000 property damage (indicate actual limits under remarks).

The form itself was excluded as it contained the self-serving statement by David Shanen that he was insured. While the trial judge might well have received in evidence a copy of the S. R. 21 as above set forth, we think it was not an abuse of discretion to receive in evidence in lieu of the document itself certain of Baptist's requests for admissions and the answers thereto. These in effect admitted Bankers Indemnity received the form and did not return it to the Commissioner within the required 15 days, nor did it in any way indicate to the Commissioner that David

Shanen was not covered "for said accident" or that there might be a question about such coverage. The reason given was: "The advice sought by the Commissioner of Motor Vehicles on SR 21 form did not apply to this situation." In other words, the claim of Bankers Indemnity was that none of the six statements above set forth applied clearly to the circumstances of this case.

The trial judge properly ruled that this did not establish a liability by estoppel against the insurance company. While we perceive no reason not to have received the original document in evidence, or at least a copy of the blank S. R. 21 form, we find no reversible error as the substance of what occurred was before the jury.

"On the last part of April," 1953 David Shanen sold the 1949 Chevrolet to pay off his chattel mortgage loan. And, on May 6, 1953 David Shanen wrote out another statement for Bankers Indemnity "to supplement" his prior statement of February 6, 1953. In this May 6, 1953 statement he writes: "I own the car and I owned it on 12-26-52. I sold the car to Conn. Motor Exchange. I sold it about a week ago. My wife and I had a discussion over who owned the car but I proved title without going to court and she relinquished her claim. I always owned that Chevrolet ever since I bought it about a year and a half ago, maybe two years ago."

On November 27, 1953 Baptist commenced an action in the Fairfield County Superior Court of Connecticut against David Shanen and Harold's Auto Service, Inc., formerly known as Harold & Shanen's Auto Service, Inc., to recover damages for the personal injuries suffered by him in the December 26, 1952 accident. It appeared at the trial of the present action in the federal court that at the time of the commencement of the Connecticut state action and at

the trial of that action Baptist was not aware of the terms of the policy issued by Bankers Indemnity. In any event, while the complaint did not in specific terms allege the ownership of the car, it did describe it as "his" with reference to David Shanen, and the claim against the corporation was based upon an allegation that at the time of the accident David Shanen was operating "his" automobile as the agent of the corporation.

Bankers Indemnity provided counsel who appeared and defended the corporation. A default was noted against David Shanen on March 12, 1954 but the damages were not assessed until later.

In a deposition taken in the state action on November 15, 1954 David Shanen testified:

> Q. I see. And this was your own privately-owned automobile? A. That's right.
>
> Q. Is that right? A. That's right.
>
> Q. Absolutely no question about that? A. Not when I purchased it, no, sir.
>
> Q. And—well, at any time did you ever transfer it to the corporation? A. No, it was never—no legal transfer.
>
> Q. I see. And you loaned it to the corporation? A. That's right.
>
> Q. You say. A. That's right.
>
> Q. At all times from the date that you purchased the car, in August of 1951, August 1st, until some time after the accident of December 26, 1952, this car was owned solely by you, is that right? A. That's right.

The state court case came on for trial before Shapiro, *J.* and a jury on June 13, 1957. David Shanen did not testify and he was not present at the trial. The upshot was that

Baptist testified David Shanen told him immediately after the accident, "It's all my fault, Mister * * * I'm * * * drunk." He told Baptist further that "he was out trying to do some business with the boys * * * you know my line of business: I sell cars, buy and sell cars." When Baptist asked him "How come you're drunk?," David Shanen replied, "I have to take a few drinks with the boys." As David Shanen's declarations were not competent to establish agency and as all efforts to corroborate his statement were unavailing, the claim against the corporation was dismissed, the Bankers Indemnity lawyers withdrew, and default damages were assessed against David Shanen for $45,000. Baptist's motion for a new trial against the corporation was denied and the rulings below were unanimously affirmed by the Connecticut Supreme Court of Errors on November 4, 1958. *Baptist* v. *Shanen,* 145 Conn. 605, 145 A. 2d 592.

In the state action no claim was made by Baptist that the corporation owned the 1949 Chevrolet. Nor was such a claim asserted in the original complaint in this action for subrogation under Conn. Gen. Stat. Sec. 38-175 (1958).[1] This claim was first asserted in Baptist's amended complaint in this action on January 9, 1962, after Bankers Indemnity had pleaded in its answer to the original complaint that the policy did not insure the liability of David

---

1 Conn. Gen. Stat. §38-175 (1958), in pertinent part, provides:

"Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death or damage to property, if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied within thirty days after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment."

Shanen with respect to the operation of the car owned by him.

The two counts of the complaint were tried separately. The first, involving the issue of whether or not David Shanen was the owner of the 1949 Chevrolet was tried to the court and jury. The second, or reformation count, was tried to the court without a jury. The first trial resulted in a verdict for defendant insurance company; the second trial resulted in a dismissal of Baptist's complaint on the merits.

Various additional facts and circumstances will be discussed in connection with a number of law points to which we now turn our attention.

II

The Law Points

A

In limine lies the claim of Bankers Indemnity that the complaint should have been dismissed on the grounds of *res adjudicata*, estoppel and laches. These defenses were ruled out as insufficient in law by Judge Anderson and again by Chief Judge Timbers. Despite the adjudication in the state court and the lapse of time before the bringing of this suit, we agree with the disposition of these defenses below. The principal reason for this conclusion is that at the time of the commencement of the state action and for a long time thereafter Baptist had no knowledge of the terms of the policy issued by Bankers Indemnity or its predecessor insurance company. Moreover, it is highly questionable whether the ownership of the 1949 Chevrolet was in any substantial sense one of the issues decided in that case. Baptist would have been entitled to recover

against David Shanen for injuries caused by his negligence as the operator of the 1949 Chevrolet no matter who was its owner. By the same token, Baptist would have been entitled to recover against the corporation if David Shanen was found to have been acting as the agent of the corporation, wholly irrespective of the ownership of the car.

B

Baptist's main point is that he should have been allowed to prove the "use" and "maintenance" of the 1949 Chevrolet by the corporation as proof of what his counsel calls "substantial" or "de facto" ownership. Having found the words "use" and "maintenance" in various miscellaneous clauses of the policy having no bearing whatever on the meaning of clause [b] under the heading of "Definition of Assured," quoted above, which clearly controls the case, counsel for Baptist conceived the theory that proof that the car was "used" in the business of this filling station repair shop and dealer in second-hand cars, and that the corporation supplied some or all of the gas and oil used by the car, was relevant and admissible because the policy was ambiguous. However, the trial judge decided the policy was not ambiguous and the proof was excluded. Counsel then shifted to the theory that this proof was admissible to prove that the corporation owned the 1949 Chevrolet. The result was that, despite numerous rulings that proof of "use" and "maintenance" of the car was not admissible, much of this evidence got into the record and was before the jury. The following statements by David Shanen will suffice to illustrate: he "loaned" the car to the corporation; he let the corporation have the use of the car; "I used the car when I was in the business"; and "I was using my car for the business."

It was under these circumstances that the following instructions to the jury were given, to which counsel for Baptist took no exception:

> Thus, you can see that the meaning of the word "ownership" and of the related words "own" and "owner" may depend upon the context in which the word is used. For the purposes of the present case, "legal title" of the automobile involved is not the sole criterion of ownership; also relevant are the purpose for which the automobile was purchased, for whose benefit it was intended to be used, and how it was in fact used. And with respect to such actual use, the questions of: who had possession and control of the car, who was responsible for its maintenance and operation, and who, in general, exercised dominion over the car, are also relevant. In this connection, I charge you that since Harold & Shanen's Auto Service, Inc., is a corporation, it can act only through its officers, agents, or employees.

As will appear shortly, these instructions were more favorable to Baptist than he was entitled to. Moreover, his motion to reopen the case was properly denied.

And so we hold:

(1) The terms of the policy were clear and wholly without ambiguity. The simple issue for the jury to determine was whether on December 26, 1952 David Shanen, concededly a director and stockholder of the named insured, was the owner of the 1949 Chevrolet.

(2) In this action by way of subrogation, governed by the terms of the policy, proof of the use or maintenance of the car, whether it had been displayed "for sale" in the

corporation's used car space, and who miscellaneous persons thought owned the car, was irrelevant and not admissible. Here the policy as a whole was designed to effect a broad coverage as would be necessary for a garage and used car lot with various automobiles and drivers moving in and out of the business. But the insurer had no intention of permitting the officers and employees of the policyholder to bring their personal vehicles under the protection of the business policy by merely associating them on occasion with the garage. That would permit intolerable abuse. The function which the exclusion clause was to serve was to distinguish automobiles owned by directors, shareholders and employees from all other automobiles which might come in contact with the business. Therefore, regardless of who used or maintained an automobile which was owned by a director, shareholder or employee, the vehicle was not covered by the policy unless at the time of the accident it was being operated in the business and by an agent of the named insured. Thus, to permit ownership to be proved by use would wholly emasculate a clause that on its face served a function by way of contrast to use.

Avery v. *Clemons*, 18 Conn. 306 (1847) and *Sagnella* v. *Central Mfrs. Mutual Ins. Co.*, 10 Conn. Supp. 288 (Super. Ct. 1941), upon which Baptist relies, hold nothing to the contrary. The combination of circumstances giving rise to disputed issues of ownership of personal property and difficulties of proof amply justify resort at times to use, maintenance and the exercise of dominion over certain chattels. Thus in *Avery* such proof was held admissible in an action of trover arising out of a third party claim in an attachment proceeding. The controversy in *Sagnella* arose out of claims under a fire insurance policy of ownership of miscellaneous articles used to service an inn.

What controls the case before us are the terms of the garage liability policy and the nature of the business of the named insured, the corporation Harold & Shanen's Auto Service, Inc. Ownership under the terms of this policy does not mean mere use, maintenance or possession.

Thus, immediately after the portion of the instructions quoted above, the trial judge charged:

> In the last analysis, you should determine ownership of the automobile here in question in the light of the purpose for which the word was used in the exclusion clause of the insurance policy here involved. In other words, did David Shanen own the automobile at the time of the accident from the standpoint of excluding coverage of that automobile under this policy?
>
> More specifically: do the indicia of ownership of this automobile existing at the time of the accident, December, 1952—such "indicia of ownership" having been defined by the Court—make it reasonable to conclude that David Shanen was, or was not, the owner of the automobile under the terms of the policy?
>
> In order to make this determination, you may take into account all of the evidence, including representations made by Shanen himself, to the public authorities and in legal proceedings under oath.

C

Baptist complains that the burden of proof of ownership of the car was placed on him rather than on the insurer. But this very point of Connecticut law was resolved in favor of the insurer by our decision in *Preferred Accident Ins. Co. of N. Y.* v. *Grasso*, 186 F. 2d 987 (2 Cir. 1951). We find no error here.

The following instructions on the subject of the presumption arising out of the use of the dealer's plates were also correct:

> In connection with the issue of ownership, you will recall there was evidence from which you could conclude that at the time of the accident there were affixed to the automobile operated by Shanen registration plates belonging to Harold & Shanen's Auto Service, Inc. If you do conclude that the corporation's plates were on the car at the time of the accident, the following instruction becomes relevant:
>
> If an automobile dealer's registration plates are affixed to a motor vehicle, they constitute prima facie evidence of the ownership of that vehicle by the dealer to whom those plates were issued. Such prima facie evidence is sufficient to support a finding of ownership, in the absence of evidence which rebuts such evidence. On the other hand, if you conclude that other evidence establishes that Shanen was the owner of the automobile, thereby rebutting the prima facie evidence of ownership in the corporation by virtue of the registration plates, then such prima facie evidence would no longer be sufficient, in itself, to support an ultimate finding that the corporation owned the automobile.
>
> The ultimate burden of proving by a preponderance of evidence that David Shanen did not own the car involved here, and therefore, that said car was covered by the insurance policy involved in this case, rests upon plaintiff.

The rules governing subrogation suits under Conn. G. S. Sections 14-165 *et seq.* also control the admissibility of certain evidence, such as David Shanen's report of the

accident and his testimony by deposition in the state case. Baptist merely stands in Shanen's shoes, as the expression is, and the case is treated as though Shanen had paid the judgment and was suing to recover on the insurance company's indemnity agreement. Such subrogation statutes are not intended to alter the balance between the insured and the insurer. They merely give an unsatisfied judgment creditor the rights of the insured and no more. If the rule were otherwise it would open up undesirable avenues of collusion between judgment creditors and debtors to the prejudice of insurance companies. This principle is inherent in our decision in *Grasso* above referred to. Baptist is the statutory transferee of a cause of action and admissions of the transferor in analogous circumstances have always been admissible against the transferee. *In re Weissman,* 19 F. 2d 769 (2 Cir. 1927); *Howard* v. *Cobb,* 3 Day 309 (Conn. 1809).

D

There was no error in the refusal to permit Allen Shanen to testify to the conversations that took place at the time of the organization of the corporation. One of the basic facts in the case was that David Shanen was to transfer to the corporation his 1949 Chevrolet as part consideration for his 28 shares of stock. It is clear that no legal transfer was ever made, by bill of sale or otherwise. Such was the uncontradicted testimony of David Shanen and paragraph 5 of Baptist's amended complaint alleged "although the transfer to it had never been confirmed in writing."

If Allen's testimony was to be to the same effect it was not only cumulative but wholly unnecessary. If, however, in view of the marital dispute between David Shanen and Allen's mother and the alleged shuttling of the 1949

Chevrolet back and forth during the unexplained absence of David Shanen after the accident, some other version of the transaction was to be testified to by Allen Shanen it is abundantly clear that this would only add to the general confusion. It was a proper exercise of judicial discretion to sustain the objections.

III

So much of the judgment appealed from as dismisses the reformation count on the merits is affirmed on the opinion below. *Baptist* v. *Bankers Indemnity Insurance Co.*, 245 F. Supp. 33 (1965).

Affirmed.

LUMBARD, *Chief Judge* (concurring):

I join in the majority opinion, except parts (II)(B) and (D). Since Connecticut did not require automobile title registration in 1952, evidence as to the use of the automobile and as to its alleged informal transfer to the corporation seems to me admissible to show that the automobile was not excluded from coverage on the ground that David Shanen "owned" it. I agree with the majority that evidence that an automobile was occasionally used in the corporation's business would not suffice to show that the corporation owned it; but this does not mean that evidence of use is inadmissible.

I concur in the result, despite my belief that evidence of transfer to and use by the corporation was admissible, because, as the majority points out, the record shows that the substance of David Shanen's testimony regarding both was before the jury.